curiae.* Counsel for the petitioner has declined to consent to the filing of this *amicus* brief.

Nature of Atapco's Interest as *Amicus Curiae*

Atapco, a corporation organized in 1931, is and has been engaged in a number of diversified business activities:

(1) Operations in the petroleum industry, consisting of exploration for and production of crude oil and natural gas, transportation primarily of petroleum products through the ownership and operation of tankers, and active and substantial interests in other oil companies.

(2) Diversified manufacturing operations.

(3) Ownership and operation of real estate projects.

Atapco paid accumulated earnings and profits tax assessed against it for the years 1963 and 1964, and thereafter filed suit for refund in the United States District Court for the District of Maryland. That Court rendered judgment in favor of Atapco which was affirmed *per curiam* by the Court of Appeals for the Fourth Circuit. This latter decision is asserted to be in conflict with the decision in the present case.

Atapco believes that the full basis of the decision of the Court of Appeals for the Fourth Circuit in its favor and the differences between the issues involved in the *American Trading* case and the present case have not been, and are not likely to be, brought to the attention of this Court, and that the Court may be led inadvertently into observations and comparisons which could seriously prejudice Atapco in the future.

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*A letter from the Solicitor General has been filed with the Clerk of Court together with this motion and brief.

The petitioner asserts a conflict between the Courts of Appeals for the Fourth and Fifth Circuits on the issue whether "unrealized appreciation of a corporation's marketable securities" should be taken into account. Pet. 6-8; Pet. Br. 12-13. This was not an issue in the *American Trading* case, and was not decided there. In the *American Trading* case, the so-called marketable securities held by Atapco were "primarily its original [contributed] and basic capital" which were "properly held and retained as *an integral part of its business.*" 362 F. Supp. at 810 (Emphasis supplied). The *American Trading* decision held that Atapco was not required to liquidate these assets in order to pay larger dividends. The Atapco situation is thus quite different from the unrelated marketable securities held by petitioner. In the present case, Xerox stock had been acquired out of earnings, were "liquid assets" and were a part of its "operating capital to finance legitimate business operations." Pet. 4-5; Pet. Br. 4-5. The petitioner's perfunctory comparison fails to recognize the important distinctions between the legal issues in the two cases.

In the present case, the only legal issue is whether the Xerox stock which was held by petitioner as operating capital should be valued at cost or on some other basis for purposes of determining its availability for meeting business needs. As noted, this issue was not involved in *American Trading.* In *American Trading,* one of many issues* was whether and to what extent Atapco was required to liquidate one integral part of its business (major interests in oil companies) so as to meet needs of other parts of its business, rather than employing its earnings for the purpose. In connection with *that issue alone,*

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*There were approximately 550 transcript pages of testimony, 350 pages of documentary exhibits, 79 specific findings of fact, a lengthy opinion and seven ultimate findings.

the District Court held that the increase in value of one integral part of Atapco's business did *not of itself* require a liquidation of such part to meet needs of other parts of its business.

The Government in its Memorandum in Opposition equally (1) ignores the express determinations by the District Court that Atapco was not obligated (as the Government had contended) to liquidate one integral part of its business (its interests in other companies) in order to meet corporate needs, and that Atapco was entitled to employ a part of its earnings and profits for this purpose; and (2) ignores the essential legal differences between capital assets which are integral parts of a corporation's business and liquid assets, which are unrelated to the business, and which form a part of operating capital. The Government, ignoring the determination that the interests in oil companies were an integral part of the business, asserts that the decision in *American Trading* was premised solely on the grounds that the interests of Atapco in other companies constituted its original capital and there were impediments to marketability. Mem. in Op., p. 5.

There is no conflict between the Fifth and Fourth Circuit decisions.

Conclusion

For the foregoing reasons, it is respectfully requested that this motion be granted in order that Atapco will not be prejudiced in the future.

Respectfully submitted,

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Dated: February 25, 1975

IN THE

Supreme Court of the United States

OCTORER TERM, 1974

No. 74-22

IVAN ALLEN COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

BRIEF FOR AMERICAN TRADING AND PRODUCTION CORPORATION AS *AMICUS CURIAE*

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BRIEF FOR AMERICAN TRADING AND PRODUCTION CORPORATION AS *AMICUS CURIAE*

Statement of Interest of *Amicus Curiae*

American Trading and Production Corporation (hereinafter called "Atapco") was the plaintiff in the case of *American Trading and Production Corporation* v. *United States of America,* 362 F. Supp. 801 (D. Md. 1972), *aff'd per curiam* on the opinion of the District Court, 474 F. 2d 1341 (4th Cir. 1973), in which Atapco was determined to be entitled to a refund of accumulated earnings taxes assessed and paid for the years 1963 and 1964.

The petitioner, Ivan Allen Company, has asserted that the *American Trading* decision conflicts in principle with the holding of the Court of Appeals for the Fifth Circuit in the present case that, for the purpose of determining whether a taxpayer has retained earnings in excess of its

business needs, liquid assets (*e.g.,* marketable securities) acquired out of earnings and profits and held as a part of the taxpayer's operating capital to meet financial needs of its business should be taken into account at their appreciated market value rather than lower original cost. Pet. 5-8; Pet. Br. 11-13.

While the Government in the Memorandum of the United States in Opposition, p. 5, asserts that there is no conflict of decisions, and the Court of Appeals for the Fifth Circuit recognizes, 493 F. 2d at 427, n. 2, that the facts in *American Trading* were different from those involved in the *Ivan Allen* case and that the two cases are distinguishable, the Government simply states that the decision in *American Trading* is premised on the grounds that the securities therein involved represented original capital and there were impediments to their marketability (Memorandum for United States in Opposition, p. 5), without any reference to the Court's determination that the interests in oil companies were an integral part of Atapco's business which were not available to pay dividends or meet other business needs.

Neither the petitioner nor the Government has indicated the significant differences between the issues involved in the two cases, and, in particular, neither has clearly pointed out that—

(a) In the present case the sole issue is at what value should liquid assets, which are concededly available to meet financial needs of the business, be taken into account in determining whether it is necessary to retain earnings and profits to meet such financial needs; while

(b) In *American Trading* the issue with respect to the interests in other corporations which it held was whether they constituted an integral part of its busi-

ness and therefore were not available to meet other business needs or to pay dividends.

Atapco is concerned that neither the petitioner nor the Government will adequately present to this Court the significant difference for the purpose of the accumulated earnings tax between a liquid asset which has been acquired out of earnings and profits, which is available to meet corporate financial needs, and which is otherwise unrelated to the corporation's business, on the one hand, and, on the other hand, interests in other companies which were contributed as a part of the corporation's original capital, which constitute an integral part of the corporation's business, which are not capable of ready sale, and the disposition of which would be subject to substantial costs and discounts, contrary to sound business practice and injurious to the corporation's financial position.[1] Atapco is also concerned that the failure adequately to present the significant factual and legal differences may result in an inadvertent equating of the facts and conclusions relating to its case with the wholly different facts and conclusions relating to the *Ivan Allen Company* case and a consequent serious prejudice to Atapco in the future.

ARGUMENT

In light of the basically different facts and issues involved, the decision of the Court of Appeals for the Fifth Circuit in the present case is not in conflict with the decision of the Court of Appeals for the Fourth Circuit in the *American Trading* case.

Section 532 of the Internal Revenue Code subjects to accumulated earnings tax "every corporation . . . formed

[1]This concern is heightened by the agreement of the Government and petitioner that the difference between capital assets and liquid assets acquired out of earnings is an "irrelevant factor." Pet. Br. 12, n. 4; Memo. in Opposition, 5.

or availed of for the purpose of avoiding the income tax with respect to its shareholders . . . by permitting earnings and profits to accumulate instead of being divided or distributed." The entire thrust of the statute is to tax, on a year-by-year basis, any earnings which are retained for such year unless it was necessary to retain a part or all of the earnings to meet reasonable business needs of the taxpayer. This purpose is accomplished by basing the tax on "accumulated taxable income" (Section 531), and defining accumulated taxable income as taxable income (computed with certain adjustments) minus dividends paid and minus an "accumulated earnings credit" for "an amount equal to such part of the earnings and profits for the taxable year as are retained for the reasonable needs of the business" (Section 535).

Where a corporation does not retain any of its earnings and profits for a particular year it has no accumulated taxable income for such year and is not liable for an accumulated earnings tax for such year regardless of the increased value of its assets. If, on the other hand, it retains a part or all of its earnings and profits for a particular year, it must be determined whether the retention was required to meet the reasonable needs of the corporation's business. This decision is "essentially factual." *Smoot Sand & Gravel Corp.* v. *Commissioner*, 241 F. 2d 197, 200 (4th Cir. 1957), *cert. den.*, 354 U. S. 922 (1957).

If the determination is that the corporation has not in a given year retained any part of its earnings in excess of the reasonable needs of its business (*i.e.*, is entitled to an accumulated earnings credit at least equal to that part of its retained earnings for the particular year) it will have no accumulated taxable income for such year. If it is determined that the corporation is not entitled to an accumulated earnings credit at least equal to the retained part of the earnings and profits, the corporation has accumulated tax-

able income on which it is liable for an accumulated earnings tax unless it can otherwise establish that it was not availed of for the purpose of avoiding income tax with respect to its shareholders by permitting earnings to accumulate instead of being distributed.

Whether a corporation has a need to retain a part or all of its earnings and profits to meet the reasonable needs of its business is dependent primarily upon whether the corporation already has sufficient assets to provide for such needs. Where the corporation has liquid assets, not related to its business, which are sufficient to meet particular needs of its business, it is self-evident that it has no need to retain further income for the same purpose. *Smoot Sand & Gravel Corp.* v. *Commissioner,* 274 F. 2d 495 (4th Cir. 1960), *cert. den.,* 363 U. S. 832 (1960); *Battelstein Investment Co.* v *United States,* 442 F. 2d 87 (5th Cir. 1971). On the other hand, capital assets which form an integral part of the corporation's business are not taken into account in determining whether it is necessary for the corporation to accumulate earnings to meet other needs of its business. *Smoot Sand & Gravel Corp.* v. *Commissioner, supra.*

It is conceded in the *Ivan Allen* case that the Xerox stock which Ivan Allen acquired out of earnings was a liquid asset forming a part of the operating capital needed to finance its business operations. Pet. 4-5; Pet. Br. 4-6; Memo. in Opposition, 1-2. The sole issue is whether these unrelated liquid assets should be taken into account at cost, which represented the earnings invested therein as contended by the petitioner, or at a higher value based on market value as contended by the Government.

This issue was not involved at all in the *American Trading* case. The facts as found by the District Court in the *American Trading* case were that Atapco was engaged in a number of diversified business activities as set forth in

the attached motion, one of which consisted of active ownership interests and participations in other companies, comprised primarily of its original contributed capital. Both prior to and in the years involved in the *American Trading* case, Atapco's capital expenditures substantially exceeded its total earnings. At the end of the years in question, Atapco also had concrete plans and commitments which would require future expenditures in excess of $12,000,000.

Without disputing these facts, the Government's position, as summarized by the District Court, was that Atapco's interests in other companies "were available at all times to the taxpaying corporation for any reasonably anticipated business need of the corporation, and that any earnings and profits from business operations or dividends on said stockholdings should have been at least in large part paid out in dividends to the taxpaying corporation's shareholders, rather than be expended for the acquisition of capital or other assets of Atapco, or for the repayment of existing indebtedness." 362 F. Supp. at 808. The District Court held, however, that these interests in other companies "were not reasonably available for the needs of the business * * * [and] were not available as readily liquid assets which the law might require be disposed of to meet current needs of the business in order to escape a Section 531 tax," but instead, "were primarily its original and basic capital * * * [and] were properly held and retained as an integral part of its business." 362 F. Supp. at 809-10.

The assertions by the petitioner Ivan Allen at page 12 of its brief that "the Fourth Circuit, when confronted with the same issue presented by the instant case, refused to consider the unrelated appreciation of a corporation's marketable securities" and that Atapco "held marketable securities having a fair market value far in excess of demonstrated

business needs" are inaccurate and incomplete because of the failure to point out the above-cited comments and holdings of the District Court. The central issue in *American Trading* was whether the interests in other companies had to be utilized to meet the reasonable needs of Atapco's business in lieu of using a part of Atapco's earnings and profits for that purpose. The issue in the present case is what value should be assigned to a liquid asset which is concededly available to meet the needs of petitioner's business.

It is respectfully submitted that the resolution by this Court of the issue in the present case either in favor of the petitioner or of the Government should not have any effect on the entirely different issues in *American Trading*. It is further respectfully submitted that the Court should not inadvertently pass judgment indirectly on the decision of the Court of Appeals for the Fourth Circuit in the *American Trading* case where that case is not under review,[2] where the elaborate record of that case is not before the Court, where the taxpayer in that case is not a party to the argument before the Court, and where the issues in that case were different from the issue now before the Court.

As this Court pointed out in the famous *Morgan* cases, there is serious danger of error where one who has not heard the evidence or arguments reaches conclusions on any case. See *Morgan* v. *United States*, 298 U. S. 468, 481 (1936). We respectfully submit that a decision on one accumulated earnings tax case does not lend itself to a talismanic solution for other accumulated earnings tax cases. *Cf. Commissioner* v. *Duberstein*, 363 U. S. 278, 284-85 (1960).

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[2]No petition for writ of certiorari was filed in the *American Trading* case.

CONCLUSION

There is no conflict between the Courts of Appeals decisions in the *Ivan Allen* case and in the *American Trading* case. The *American Trading* case, which presented different issues, is not before the Court. We respectfully request that the Court not pass judgment indirectly on the *American Trading* case in these circumstances.

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